IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-614

CAMERARTS PUBLISHING CO., INC., an Illinois Corporation, ALLIED NEWS CO., INC., an Illinois Corporation, FRANK SORREN and ROBERT SORREN,

Petitioners,

vs.

RICHARD S. PRATHER,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Respondent's brief in opposition highlights what petitioners have said in their Petition for Certiorari. Contrary to Respondent's contentions, this case does not involve merely questions of proof, but involves important

issues of law. These issues of law have not been discussed adequately by either the District Court or Court of Appeals. The failure of the Courts below to address themselves to these issues is perhaps the strongest reason in favor of granting the Petition of Certiorari in this case. The issues presented in this cause cut across several important areas of copyright law in which there are no authoritative pronouncements, or in which there is conflict. This cause presents an admirable vehicle for this court to fill that void and to resolve conflicts.

In response to petitioners' clear demonstration that the trial court erroneously granted separate "in lieu" damages against both the distributor and publisher, respondent has cited absolutely no authority to uphold such an extraordinary ruling. There is, as stated by petitioners, absolutely no authority for such decision. To allow such obviously improper precedent to stand will create needless and untold confusion in the future development of the law of copyright and in the understanding of the current law.

In arguing that the Statute of Limitations did not bar this cause of action, the plaintiff demonstrates the grave inconsistency in the rulings of the courts below. Plaintiff simply cannot have it both ways. Either the distributor and the publisher are separate, and the Statute of Limitations has run as to the publisher, or they are one entity and plaintiff is entitled to only one award of damages against that entity. The only case which plaintiff cites in support of its position in regard to the Statute of Limitations is a District Court case which is clearly an aberration in the law. *Baxter* v. *Curtis Industries, Inc.*, 201 F. Supp. 100 (N.D. Ohio 1962). See cases cited

on pages 12-14, Petition for Certiorari. Allowing such aberration to stand, and giving it greater impetus by allowing the decisions below to stand, would again create unnecessary confusion.

Plaintiff's argument that the alleged copying in this cause was repeated and substantial does nothing to meet defendants' arguments regarding *de minimus*. Plaintiff continues his "shotgun" approach to this case in his brief in opposition. Each count is a separate and independent count which must either stand or fall by itself. Reference cannot be had to other counts to support each individual cause of action in regard to whether there was infringement. Plaintiff's response to defendants' clear demonstration that 39 of the counts state no cause of action is to cite other counts. That is tantamount to no answer at all. The copying in the 39 counts, which are *de minimus,* was not word for word nor substantial copying, and reference to other alleged copying will not make them so. As pointed out in defendants' Petition for Certiorari, much of the alleged "massive plagiarism" is contained within plaintiff's own mind. Plaintiff has recovered a windfall. As mandated within the statute itself, the "in lieu" damages "shall not be regarded as a penalty." The courts below have ignored this statutory direction, and have penalized these defendants for the actions of the author of the stories involved, who is not a party to these judgments. While innocence of an infringer will not insulate him from liability, the cases are legion that such innocence is to be taken into consideration in awarding damages. This, the courts below failed to do, compounding the damages awarded to plaintiff impermissibly.

In seeking to uphold the award of attorneys' fees, again, plaintiff has ignored all of the authority cited in the Petition for Certiorari which clearly states that attorneys fees should not be awarded in cases such as this. Contrary to the argument made in the Brief in Opposition, infringement was not clear in many of the counts of the complaint. Contrary to the statements made by plaintiff, defendants did introduce evidence that defendants lacked knowledge of the infringements, which evidence was not disputed, and that the plaintiff had been guilty of laches. The defenses raised by defendants were serious and are serious. To penalize a party for contesting a matter in good faith is directly contrary to both the statute and the decision of all of the lower courts. This is clearly not warranted.

In response to the great amount of authority cited by defendants herein, which shows without question that the courts below were guilty of a grave departure from the settled law of copyright, plaintiff has presented nothing. He has attempted to justify this decision on the grounds that defendants failed to meet their burden of proof, when the issue is not one of fact, but one of law. There is, in reality, no dispute as to the facts. The dispute is as to the legal conclusions to be drawn from these facts. Indeed, plaintiff has not seriously contested any of the facts as set forth by defendants. These facts and the unbroken authority cited by defendants show that the decisions of the courts below in this matter were obviously and demonstrably wrong. Allowing such opinions to stand will not only do a great injustice to these defendants, but will serve to inject an element of confusion into the law of copyright which will only serve to cause

injustice in the future. Not only have defendants shown that there is a conflict between the decision in this matter and the decisions in other circuits, but they have shown that there is a conflict between this matter and virtually every other case decided on the issues raised herein.

Wherefore, Petitioner prays that this Court's Writ of Certiorari issue, and that the judgment below be reversed.

Respectfully submitted,

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